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No. 71-1092

In the Supreme Court of the United States

OCTOBER TERM, 1971

STAR OFFICE SUPPLY COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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1. The Federal Trade Commission found that petitioners, Star Office Supply Company and its president, Henry Pinkwater, had engaged in unfair, false, misleading and deceptive practices in the sale of office supplies in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and entered a ten paragraph cease-and-desist order (Pet. App. A 2, A 110–A 112). The court of appeals affirmed from the bench without opinion (Pet. 5).

The evidence showed that petitioners solicited orders for office supplies by telephoning prospective purchasers and misrepresenting the nature of their busi-

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ness and their affiliations. Petitioners' jobber-salesmen would frequently claim that they had been recommended by another official of the prospect's firm; that they were attempting to liquidate a relative's stationery firm, and knew nothing of the business; and that they were affiliated with organizations such as Radio Free Europe. None of these assertions was true. See *e.g.*, Pet. App. A 45–A 46, A 58–A 59, A 60–A 61, A 66–A 67.

There was also considerable evidence that petitioners deliberately shipped more merchandise to purchasers than had been ordered (see, *e.g.*, Pet. App. A 50, A 51, A 53, A 56–A 57, A 66, A 70–A 71, A 75, A 88). Frequently, the price of goods would be billed at a higher amount than the purchaser had been led to expect (see *e.g.*, App. A 55–A 56, A 83). Merchandise sold this way was often returned, but frequently a portion of the order would be inadvertently used, or retained, and paid for by the customer (App. A 51, A 53, A 56, A 57, A 60, A 73).

The Commission's order (App. A 110–A 112) directed petitioners to cease and desist such misrepresentations; to furnish purchasers with pre-shipment written notification as to the type, quantity and price of the supplies to be shipped (para. 7); not to deviate from the pre-shipment written notification unless upon express authorization of the purchaser (para. 8); and not to thwart cancellation of any orders obtained in violation of the cease and desist order (para. 9).

2. Petitioners do not question the Commission's finding that their sales practices were unfair and de-

ceptive in violation of Section 5 of the Federal Trade Commission Act; they contend only that paragraph 7 of the order, requiring pre-shipment notification, was improper (Pet. 2). As this Court has repeatedly held, the Commission has broad authority to determine the type of order "necessary to cope with the unfair practices found." *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473. Unless the remedy selected "has no reasonable relation to the unlawful practices found to exist," the courts "will not interfere." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613.

The remedy chosen here is reasonably related to petitioners' practice of shipping larger quantities of merchandise than were ordered. As the Commission explained (Pet. App. A 8–A 9), pre-shipment notification will give customers the opportunity to inform petitioners of any variations between what was ordered and what petitioners intend to ship, and thus protect customers against excess shipment or increased prices. Indeed petitioners' continued argument in favor of "'[S]chlock' pressure methods of competitive selling" as "part of the *enterprise* energies in these fields of American business * * *" (Pet. 9, emphasis in original) demonstrates the Commission's wisdom in requiring a prophylactic remedy rather than a mere order to desist.

Contrary to petitioners' assertion (Pet. 6), the Commission's remedy here is not unique. The Commission has frequently required violators of Section 5

to take affirmative steps before making a sale to ensure that their customers are aware of the seller's obligations; such orders have uniformly been upheld by the courts. See, *e.g.*, *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 423 F. 2d 423 (C.A. 4), certiorari denied, 400 U.S. 828; *Portwood* v. *Federal Trade Commission*, 418 F. 2d 419 (C.A. 10); *S & S Pharmaceutical Co.* v. *Federal Trade Commission*, 408 F. 2d 487 (C.A. 5).

3. Petitioners allege that paragraph 7 is a drastic remedy which will destroy their business "within a very short time" (Pet. 8). Even assuming that preshipment notification would be as onerous as petitioners claim,[1] Section 5 gives the Commission a mandate to stamp out unfair business practices, and, if need be, those businesses "which persist in practicing them." *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (C.A. 5).

However, if the condition proves too onerous petitioner can apply to the Commission for relief. If that relief is denied, petitioner "must remember that those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431.

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[1] Petitioners have previously used a quite similar procedure (Pet. A 93–A 94).

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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